IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 76-1721

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,

Petitioners,

v.

THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY

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I. Reply to Memorandum of Federal Respondents

The Memorandum submitted by Federal Respondents in opposition to the petitions for a writ of certiorari underscores the urgent need for this Court to review the decision of the Court of Appeals below.

1. Federal Respondents characterize the Commission's decision in this case as based on a holding that the proportional rates at issue are "unreasonably" or "unjustifiably" discriminatory (p. 2). They then seek to square that holding with this Court's decision in *Inland Waterways*, which they construe as sustaining "the Commission's discretionary determination" that the tariffs there at issue were not unreasonable (p. 4).

This argument badly misconstrues both the Commission's holding in this case and this Court's decision in *Inland Waterways*.

Unlike many other agency decisions which this Court is asked to review, the Commission's decision in this case was not based upon an exercise of discretion or expertise. It was based on the legal theory that this Court's decision in *Mechling* (followed later in *Blue Line*) construing Section 2 of the Interstate Commerce Act *compelled* a holding that the proportional rates at issue here are unlawful. On the basis of this same theory, the Court of Appeals upheld the Commission's decision (R.R. App., pp. a-2–a-3, a-10).

The relevant facts in this case are undisputed and exactly the same as in *Inland Waterways* and *Mechling*. In all three cases, (1) grain moved from country origins into Chicago, (2) the grain was stored or processed in Chicago, and (3) the grain then moved outbound via rail to destination in the East. In each case country origins were the same (or in the same rate group), and ultimate destinations were the same (or in the same rate group).[1] The physical characteristics of the outbound rail movement from Chicago were the same regardless of how the grain arrived at Chicago.

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[1]Federal Respondents misstate *Inland Waterways* when they assert (p. 4) that the Commission did not consider in that case whether the ex-barge shipments were from the same ultimate country origins as the ex-rail shipments. Both in *Inland Waterways* and in this case, grain originated at the *same* country origins (or origins within the same rate group)—then moved via barge or railroad to Chicago—then via rail to the *same* destinations (or destinations in the same rate group). As to this grain, what differed was *not* the origins or distinations, but the nature of the movement—either through (rail-rail), or non-through (barge-rail).

The rate structure involved in *Inland Waterways* and the railroads' proposals to change it may be summarized as follows:

(footnote continued on next page)

The only relevant difference that distinguishes the cases is that:

(1) In *Inland Waterways* the barge-rail movement was *not* a through movement—because at that time barges and railroads did not maintain through routes or through rates with each other;

(2) In *Mechling* the barge-rail movement *was* a through movement—because after the 1940 Act became effective, the barges and railroads were required to, and did, enter into and maintain through routes and rates with each other; and

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(1) On grain shipped from Chicago to "Trunk-line" and "New England" territories "the proportionals did not vary with the origin of the grain" (319 U.S. at 676). These proportionals applied to both ex-rail and ex-barge grain from the same country origin points (or points in the same rate groups), and the railroads sought to cancel the proportionals from the ex-barge grain and to charge the higher local rates instead (319 U.S. at 676).

(2) On grain shipped from Chicago to "Central Territory" so-called "Northwest proportionals" applied on ex-barge grain no matter where the grain originated. Three different sets of proportionals applied to ex-rail grain, with the level of the proportional varying with the origin of the grain. To some destinations in Central Territory these ex-rail proportionals were lower than the ex-barge proportionals (the "Northwest" proportionals), but the barge lines made "no complaint" of this and were "content to assert that they [were] entitled to the Northwest proportionals as to such grain" (319 U.S. at 674–75; *see also* 246 I.C.C. at 365).

The controversy as to rates to Central Territory (which the Court of Appeals below regarded as the principal area of dispute, R.R. App., pp. a-7–a-8), was actually the least important aspect of the case, for Mr. Justice Black noted in *Mechling* that "this rate controversy chiefly revolves" around shipments to Trunk-Line and New England territories (330 U.S. at 570, n.1) and did not even discuss the rates to Central Territory.

(3) In this case the truck-rail movement is *not* a through movement—because under the 1935 Motor Carrier Act, the trucks and the railroads are not required to, and do not, enter into through routes and rates with each other.

The crux of this case is that the Commission's hearing examiner focused only on the conceded identical character of the physical characteristics of the outbound rail movement from Chicago, and gave no effect to the fact that the truck-rail movement is not a through movement. Based solely on the identical physical character of the outbound rail movement, the hearing examiner and the Commission ruled that, applying this Court's decision in *Mechling*, it is a violation of Section 2 to charge different rates for the outbound rail movement. The Commission arrived at this decision not by exercising its expert discretion, but by applying what it erroneously believed was the mandate of this Court in *Mechling*—a mandate it construed as requiring invalidation of the proportional rates *as a matter of law*.

It is true that in *Mechling* the outbound rail movements were physically the same whether the inbound movement was by barge or rail. But that physical similarity is *not* what rendered the proportional rates there unlawful under Section 2. In *Inland Waterways* the outbound movements had also been physically the same, but this Court did not invalidate the proportional rates in *Inland Waterways*. The crucial difference was that in *Inland Waterways* the barge-rail movement over Chicago was not a through movement; thus the movements being compared to see if there was a Section 2 violation—*i.e.*, the local (barge-rail) movements and the through (rail-rail) movement—were not "like".[2] In *Mechling* the barge-rail movements had become (by virtue of the 1940

[2] *I.e.*, not for "a like and contemporaneous service in the transportation of a like kind of traffic" under Section 2.

Act) a through movement; thus the movements being compared—i.e. the through (barge-rail) movement, and the through (rail-rail) movement—were now "like" for purposes of Section 2.

Federal Respondents, like the Commission and the Court of Appeals, have misread this Court's decisions; and their attempt to defend the holding below, based on the theory that the Commission was merely exercising its "discretion" in determining what sorts of discriminations are "unreasonable" or "unjustifiable," reflects their fundamental misunderstanding of what the Commission has done. Indeed, the very assumption that the Commission has "discretion" to permit or strike down proportional rates under Section 2 supports the position of the railroads, because the inherent premise of that assumption is that some proportional rates applied to through movements (where higher local rates apply to physical identical local movements) *would be lawful* under Section 2. Yet the decisions of the Commission and Court below are based on the *precisely opposite legal premise* that all such different rates (applicable to the physically same or similar movements) would be unlawful under Section 2. Federal Respondents' memorandum thus emphasizes the need for this Court to review this case to correct the erroneous readings of this Court's decisions. The need for such review is particularly compelling where, based on its erroneous reading of *Mechling*, the Commission (with the sanction of the Court below) is proceeding to disrupt the national grain rate structure on the theory that such disruptive consequences are irrelevant because they are compelled by this Court's 30-year old decision in *Mechling*.

2. Federal Respondents in their memorandum (p. 3) also quote and rely upon the "observation" of the Court of

Appeals that it is "beside the point" that the truck-rail movement consists of two local (non-through) movements to, and then from, Chicago; whereas the rail-rail and barge-rail movements are through movements from origin, through Chicago, to ultimate destination. The Court of Appeals' "observation," and Federal Respondents' reliance on it, illustrate the fundamental character of the legal error upon which the Court of Appeals' decision is premised.

There is no more firmly established principle in transportation law than that a through rate (applicable to a through movement from point X, through point Y, to point Z) may be *less than* the sum of the local rates (applicable to local movements from X to Y, and from Y to Z). (*See* Petition for Certiorari of Railroad Petitioners herein, pp. 5–6.) This principle underlies the national grain rate structure and the rate structures applicable to other commodities. The principle applies despite the fact that inevitably a portion of the through movement is exactly the same, in terms of the physical characteristics of that movement, as each of the local movements.

It is this principle which has supported application of proportional rates lower than local rates since the very beginnings of the railroad industry, and since the Interstate Commerce Act (and Section 2 thereof) were written into law. Proportional rates are portions of through rates (*see* cases cited in Petition for Certiorari herein, p. 6). Because a through rate may be less than the sum of applicable locals, it necessarily follows that a portion of a through rate may be less than the applicable local rate covering the same physical movement. To deny this conclusion is to deny the fundamental principle from which it is derived. For Federal Respondents to contend (as the Court of Appeals below *held*) that it is "beside the point" whether a movement is local or through

is to upset a century of transportation law and practice, attribute to Congress a useless purpose in enacting the 1940 Act (because the barges would be entitled to "equal treatment" under Section 2 without the 1940 Act), frustrate a distinction carefully made by Congress when it passed the 1935 Motor Carrier Act (because even though trucks are not entitled to through route status thereunder, they could obtain through route treatment under Section 2), contradict this Court's square holding in *Inland Waterways*, and render pointless the entire discussion in this Court's opinion in *Mechling* as to the terms, history, and effect of the 1940 Act on the status of water carriers.

The disruptive effect of the decision below on the nation's grain rate structure will be severe.[3] It will lead to economic hardship for the railroads, many shippers, and many communities. The flow of grain from country origins through intermediate marketing and processing points to ultimate destinations will be interrupted and diverted—to the great disadvantage of those in the farming, elevator, processing, transportation, and grain trading businesses who have made heavy investments premised on existing patterns of grain flow. These consequences will be inflicted—not because the Commission thinks they are in the public interest, or because it has even considered them—but because the Commission and the Court of Appeals believe they are compelled by this Court's decision in *Mechling*.

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[3]The Commission in its recent Annual Report to Congress (90th Annual Report, p. 34 (1976)) acknowledged that its decision herein would "affect the entire grain rate structure" applicable to grain movements from the West or Midwest to Eastern destinations. See also the Commission's Special Projects Staff statement describing this case as causing "a significant modification of the historic pattern of gathering rates from country origins and intermarket proportionals. . . ." (Opening Statement of Special Projects Staff in Ex Parte No. 270, Sub-No. 9, p. 2).

In these circumstances, it is difficult to conceive of a case more deserving of review by this Court.

II. Reply to Brief for Respondent Chicago Board of Trade

Chicago Board of Trade advances very different, but no less invalid, reasons why it believes this Court should not review the decision below. The thrust of its argument is an attempt to show that the decision below does not conflict with this Court's decision in *Inland Waterways*. The attempted showing is demonstrably erroneous.

1. Chicago Board argues that if *Inland Waterways* is construed as upholding proportional rates against Section 2 attack, then it was overruled by *Mechling* (Chicago Brief, p. 19). However, this contention was decisively rejected by this Court in *Mechling*. Mr. Justice Black *distinguished Inland Waterways* on the precise ground which Railroad Petitioners have contended is the controlling difference between the two cases. Mr. Justice Black noted that "in the original proceedings before the Commission" leading to *Inland Waterways*, "the last evidence was heard and the record was closed before the 1940 Transportation Act became a law." By contrast, "the present proceedings are fully governed by the 1940 Act" (330 U.S. at 574 n. 7).

Nothing in the *Mechling* opinion provides any indication that *Inland Waterways* was being overruled. Mr. Justice Jackson, who had written the majority opinion in *Inland Waterways* four years earlier, dissented in *Mechling* but did not suggest that *Inland Waterways* was being overruled and, in fact, did not even mention that case.[4] Likewise, Mr. Justice Black, who had dissented in *Inland Waterways* on the ground that

[4]Mr. Justice Jackson based his dissent on his view that provisions of the 1940 Act had been wrongly applied (330 U.S. at 584–85).

the 1940 Act should have been applied at that stage of the litigation (319 U.S. at 692, 697–703) because "the Commission should have felt itself bound" by that Act (*id.* at 701), did not suggest that the holding of *Inland Waterways* was being overruled. Rather, he recognized that the 1940 Act—by giving barges the same through-route status as railroads—had changed the result as to water carriers.

In *Inland Waterways*, Mr. Justice Jackson noted the failure of the barge lines to rely on the 1940 Act before the Commission and suggested that they return to the Commission and accept the Commission's own invitation to commence a "proper proceeding" in which it might "prescribe proportional rates on the ex-barge traffic lower than local rates or joint rail-barge rates lower than the combinations" (248 I.C.C. at 311) (319 U.S. at 690–91). Mr. Justice Jackson noted that the difficulties faced by the barge lines in presenting their case in *Inland Waterways* might not be critical in a reopened proceeding because with respect to water carriers, "*The applicable law has changed*" (*id.* at 690) (emphasis supplied).[5]

[5]When the barge lines returned to the Commission after losing in *Inland Waterways*, the Commission recognized that the provisions of the 1940 Act specifically designed to change the status of the barge lines had been invoked and would now form the basis for decision (262 I.C.C. at 8–9). Accordingly, the issues in the new proceeding were drastically different from the issues in *Inland Waterways*. The question no longer was whether the railroads could charge ex-barge grain (which now moved in a barge-rail through movement) the local rates (the railroads recognized that they could not; *see* 262 I.C.C. at 25), but whether the ex-barge proportionals had to be the same as the ex-rail proportionals or instead could be somewhat higher. The Commission settled on a "differential" which made the ex-barge proportionals 3 cents per hundredweight higher than the ex-rail proportionals. This action was based direct-

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Given this Court's own distinction between *Inland Waterways* and *Mechling*, and the consistent recognition by this Court and the Commission that *the 1940 Act* changed the result in *Inland Waterways*, there is no basis whatever for Chicago Board's contentions that *Inland Waterways* was overruled in *Mechling*. No decision of the Commission or the courts has ever suggested such a possibility, and the continuing force of *Inland Waterways* has repeatedly been recognized.[6]

2. The second line of argument pursued by Chicago Board is that even if *Inland Waterways* was not overruled, this Court's decision in that case did not recognize a distinction under Section 2 between through and local movements but rather turned upon a finding that there was no geographic discrimination; alternatively, Chicago Board argues that this Court made no Section 2 holding at all in that case.

These contentions are transparently without merit. *Inland Waterways* squarely upheld the lawfulness under Section 2 of

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ly on the provisions of the 1940 Act specifically applicable to barge lines—not on Section 2 as it applied to the facts as they stood prior to the 1940 Act.

Mr. Justice Black's opinion for the Court in *Mechling* held this 3 cent differential unlawful. The opinion included an extensive discussion of the provisions of the 1940 Act (330 U.S. at 574–78) and a recognition that the barge-rail shipments were now "through movements" over "through routes" (330 U.S. at 570–71). These essential changes in law made the Section 2 holding in *Mechling* —that the *through* barge-rail transportation should receive the same proportional rates as the *through* rail-rail transportation—essentially different from, and entirely consistent with, the holding in *Inland Waterways* that Section 2 did not require the extension of proportional rates to *local* movements.

[6] *See, e.g., Koppers Co., Inc.* v. *United States*, 166 F. Supp. 96, 101-02 (W.D. Pa. 1958); *Consolidated Edison Co., Inc.* v. *Virginian Ry.*, 292 I.C.C. 23, 26 (1954).

restricting proportional rates to through movements and not applying them to local movements, despite the identical physical characteristics of the outbound rail movements from Chicago. This Court's discussion of the history and basis of proportional rates was based directly on their application to through rather than local traffic and did not indicate that the issue was limited to geographic discrimination (319 U.S. at 684–85). And the issues in *Inland Waterways* did not involve any contentions of geographic discrimination.[7] The barge lines were there resisting the railroads' proposal to apply the local rates to grain brought to Chicago by barge while applying the lower proportional rates to grain brought to Chicago by rail. The barge lines' argument there was identical to the argument made by Chicago Board of Trade in this proceeding—that since the physical carriage beyond Chicago was the same for both ex-barge and ex-rail grain, for that reason the rates necessarily had to be the same (319 U.S. at 683). That contention was squarely rejected by this Court (*id.* at 684–85).

Respondents also suggest that this Court in *Inland Waterways* made no Section 2 holding at all because the Commission did not approve or prescribe the rates proposed by the railroads there. However, even though the Commission and this Court did not decide all possible issues as to the reasonableness or lawfulness of the proposed rates, they *did* decide the Section 2 issue. The barge lines had not argued all possible issues of reasonableness or lawfulness; they had "pitched their case" (319 U.S. at 683) on the argument that the proportional rates violated Section 2 because they were not applied to the non-through barge-rail movements, even though the outbound rail service from Chicago performed in connection with through movements was physically the same

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[7] *See* pp. 2–3, n.1 *supra*.

as in the local, non-through movements. This Court in *Inland Waterways* (like the Commission) rejected that argument (319 U.S. at 684–85). Its square holding to that effect, based on its construction of Section 2, is no less significant because it did not reach or resolve other issues which might have been reached if the Commission had prescribed the rates at issue.

3. Chicago Board's third line of argument is an attempt to bolster infirmities in the Court of Appeals' decision by mischaracterizing it and advancing arguments and factual assertions which were not even mentioned by the Court of Appeals—an approach which only serves to confirm that the grounds on which the Court of Appeals did rely were incorrect.

Chicago Board attempts to avoid the effect of the ruling below by arguing that the Court of Appeals held that it was "beside the point" whether the rail-rail or barge-rail shipments moved over "through routes" (Chicago Board Brief, pp. 3, 14). However, the Court of Appeals made the significantly broader holding that it was "beside the point" that "the truck-rail transportation of grain is a *local movement* whereas the rail-barge, lake-rail movement is a *through movement*" (R.R. App., p. a–10) (emphasis supplied). As shown above (*supra*, pp. 5–7), that holding of the Court of Appeals is contrary to a century of rate practice under the Interstate Commerce Act, numerous decisions of the Commission, and *Inland Waterways*.[8]

[8]Chicago Board misses the point of the distinction between through and local movements by arguing that "whether the proportional rates are discriminatory depends on the willingness of the railroads to voluntarily apply them" (Chicago Brief, p. 15). The local rates do *not* apply *solely* to ex-truck traffic. They also apply to *all other* local traffic, including grain grown locally at

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Unlike Federal Respondents, Chicago Board declines to attempt an explicit defense of this erroneous holding of the Court of Appeals, but rather attempts to support the decision below on the factual assertion that no through routes over Chicago exist on rail-rail movements or on movements between the railroads and the barge lines and lake vessels (Chicago Brief, p. 15).

The opinion of the Court of Appeals did not question the existence of rail-rail or barge-rail through routes over Chicago, and its decision was certainly not founded on the factual premise asserted by Chicago Board. Moreover, existence of such through routes is established by the maintenance of proportional rates applicable to the eastbound movement of ex-rail, ex-barge, and ex-lake wheat.[9] These

Chicago, grain brought to Chicago by rail under intrastate rates, and grain brought to Chicago by rail which has forfeited its transit privilege by remaining in Chicago elevators so long as to lose its status as part of a through movement. There is nothing "discriminatory" about treating all local movements the same by charging them the local rates, while treating all through movements the same by charging them the proportional rates.

[9]This Court held in *Thompson* v. *United States*, 343 U.S. 549, 557 (1952), that a through route is established by publication of a proportional rate applicable to through traffic forwarded via another carrier.

Chicago Board cites two cases in an effort to avoid the holding in *Thompson*. In the first, *Chicago and Wisconsin Points Proportional Rates*, 10 M.C.C. 556 (1938), the Commission found that the rates at issue were not proportional rates and ordered them cancelled (10 M.C.C. at 562, *aff'd*, 17 M.C.C. 573, 575–76 (1939)). This action was ultimately affirmed by this court. *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344 (1940). Here there is no dispute that the rates from Chicago to the east *are* proportional rates. In the second case, *Refund Provisions, Lake Cargo Coal*, 299 I.C.C. 659 (1957), the Commission found that the traffic "comes to rest" at reshipping

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through routes are required by law[10] as recognized by this Court's mandate in *Mechling*.[11]

Chicago Board also suggests that this proceeding is governed by *Mechling* because of the exemption for water carriage of certain bulk commodities (Section 303(b), 49 U.S.C. §903(b); Chicago Board Brief, pp. 12–13, 16–17 and nn. 9, 11). That exemption has nothing whatever to do with this case. Neither the Court of Appeals nor the Commission based their decisions on the scope of the bulk commodity exemption for barge traffic. Nothing in the Interstate Commerce Act prevents railroads from joining with carriers which haul exempt cargo in through routes.[12] Nothing in the

points and frequently moved outbound "at intrastate rates." The through ex-rail, ex-barge, and ex-lake grain traffic out of Chicago, by contrast, does not "come to rest" at Chicago but rather legally remains in a continuous through movement (*see, e.g., Inland Waterways*, 319 U.S. at 684) and always moves under interstate rates to the east.

[10]Railroads have been required to establish through routes with one another since the Hepburn Act of 1906, and with barge lines and lake vessels since the 1940 Transportation Act (present Section 1(4), 49 U.S.C. §1(4)). They are *not* required to maintain through routes with trucks (49 U.S.C. §316(c)).

[11]Chicago Board's argument reduces to a contention that the railroads have been in violation of the Hepburn Act for more than 70 years and this Court's mandate in *Mechling* for over 30 years by failing to establish through routes with connecting railroads and barge lines. This contention has never before been raised by any railroad or barge line or shipper because, as shown by the tariff provision quoted by Chicago Board (Brief, p. 8 n. 5), the railroads have in fact extended through routes and proportional rates to ex-rail and ex-barge grain.

[12]This Court's many decisions defining the term "through route" contain no indication that through routes cannot be formed with unregulated carriers. *See, e.g., Thompson* v. *United States*, 343 U.S. 549, 556–57 (1952); *St. Louis S.W. Ry.* v. *United States*, 245 U.S. 136, 139 n.2 (1917).

Act causes a through movement over a through route to lose its through character simply because the cargo hauled by one carrier in the through route is unregulated.

Moreover, the protections extended to barge lines in the 1940 Act apply to any "common carrier by water subject to [part III]" of the Interstate Commerce Act,[13] and Chicago Board offers no reason why that status would change according to whether the cargo which such a water common carrier happens to be carrying at any given moment qualifies for the bulk commodity exemption.

CONCLUSION

The controversy in this case turns solely on a question of law relating to the proper construction of this Court's holdings in *Inland Waterways* and *Mechling*. There were no disputed facts to be resolved by the Commission under Section 2, and the Commission did not exercise any transportation expertise or make any discretionary choice between available alternative courses of action. Rather, the Commission based its decision solely on its erroneous view of the legal requirements compelled by this Court's decision in *Mechling*. Based solely on the authority of this Court's decision (which it has badly misconstrued), the Commission has taken a step which will upset the historic grain rate structure—with no consideration of the consequences—because it believes that under

[13]Section 1(4), 49 U.S.C. §1(4). *See also, e.g.*, Section 3(4), 49 U.S.C. §3(4); Section 307(d), 49 U.S.C. §907(d).

Mechling that step is compelled and the consequences are legally irrelevant.

For the foregoing reasons and those set forth in the Railroads' Petition for Certiorari, this Court should issue a writ of certiorari to review and correct the judgment of the Court of Appeals.

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